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No. 02-

IN THE

Supreme Court of the United States

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE COMPANY,

Petitioners,

v.

HARRY W. LOW, in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The California Holocaust Victim Insurance Relief Act ("HVIRA") requires the Petitioners, California-licensed insurers, to provide extensive information regarding every insurance policy issued in Europe between 1920 and 1945 by every European insurer with which the Petitioners have a legal relationship. The Petitioners do not have custody or control over the information demanded and production would violate German data protection laws. Regardless, the HVIRA mandates suspension of the Petitioners' existing California licenses for their failure to comply.

The Eleventh Circuit Court of Appeals has previously determined that, as applied to the Petitioners, a materially identical Florida statute violates the Due Process Clause. *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001). The Ninth Circuit has rejected this reasoning and has upheld the HVIRA.

The questions presented are:

1. Whether the State of California's attempt to investigate and regulate insurance policies issued in Europe by European insurers to European residents exceeds the State's legislative jurisdiction under the Due Process Clause.

2. Whether the HVIRA's provision mandating suspension of an insurer's existing business license for failure to provide information outside of that entity's custody or control violates concepts of fundamental fairness embodied in the Due Process Clause.

3. Whether the HVIRA, which interferes with U.S. foreign policy initiatives, international obligations and the law of foreign nations, violates the foreign affairs doctrine articulated in *Zschernig v. Miller*, 389 U.S. 429 (1968).

LIST OF PARTIES AND RULE 29.6 STATEMENT

The following entities were also parties at the Court below and are being served as respondents herein:

Harry W. Low, in his capacity as the Commissioner of Insurance of the State of California;

American Insurance Association;

American Re-Insurance Company;

Assicurazioni Generali S.p.A.;

Winterthur International America Insurance Company;

Winterthur International America Underwriters Insurance Company;

General Casualty Company of Wisconsin;

Regent Insurance Company;

Southern Insurance Company;

Unigard Indemnity Company;

Unigard Insurance Company; and

Blue Ridge Insurance Company

Gerling Global Reinsurance Corporation of America, Gerling Global Reinsurance Corporation-U.S. Branch; Gerling Global Life Reinsurance Company; Gerling Global Life Insurance Company; Gerling America Insurance Company; and Constitution Insurance Company identify the following parent corporations and all publicly traded companies that own ten percent or more of their stock:

Gerling-Konzern Allgemeine Versicherungs AG;

Deutsche Bank;

Gerling-Konzern Versicherungs-Beteiligungs-AG;

Gerling-Konzern Globale Rückversicherungs AG; and

Gerling Global U.S. Investments, Inc.

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Gerling Petitioners[1] respectfully petition for a writ of certiorari to review the opinions of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's initial opinion (per Shubb, D.J.) entering a preliminary injunction (App., *infra*, 104a-139a) was not published. The court of appeals' opinion (per Graber, C.J.) rejecting the reasoning of the district court and remanding (App., *infra*, 71a-103a) is published at 240 F.3d 739. The district court's subsequent opinion (per Shubb, D.J.) granting Gerling Petitioners' summary judgment motion (*id.*, at 42a-70a) is published at 186 F. Supp. 2d 1099 (E.D. Ca. 2001). The court of appeals' subsequent opinion, as amended (per Graber, C.J.), reversing the district court (*id.*, at 1a-41a) is published at 296 F.3d 832. The court of appeals' order denying rehearing and rehearing *en banc* is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 15, 2002, and issued its amended opinion and order denying rehearing and rehearing *en banc* on September 9, 2002. *Id.* at 40a-41a. Gerling Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Due Process Clause and the Holocaust Victim Insurance Relief Act (Cal. Ins. Code §§ 13800-13807) are reprinted in the Appendix at 140a-151a. The provisions of the "Knox Bill" (1999) Cal. A.B. 600 are reprinted in the Gerling Petitioners' Lodging at L-36-L-41.

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1. Gerling Global Reinsurance Corp. of America, Gerling Global Reinsurance Corp-U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company and Constitution Insurance Company.

STATEMENT OF THE CASE

The Gerling Petitioners are U.S. and Canadian-based insurers and reinsurers licensed to do business in, among other states, California and Florida. Due to conflicting decisions rendered by the Ninth and Eleventh Circuit Courts of Appeals, the Gerling Petitioners face divergent obligations under materially identical Holocaust-era insurance statutes enacted by California and Florida. The Eleventh Circuit has determined that the demands made by the Florida statute violate due process protections afforded the Gerling Petitioners by the Fourteenth Amendment. *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) ("*Gallagher*"); Lodg., *infra*, L-1-L-28. The Ninth Circuit reached the opposite conclusion with respect to the California statute and has effectively authorized the California Insurance Commissioner ("Commissioner") to suspend the Gerling Petitioners' licenses to conduct business for their inability to produce the information demanded. *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (9th Cir. 2002). App., *infra*, 1a-41a.

The district court found that the Gerling Petitioners do not have custody or control over the European insurance information sought by California. The German government has determined that disclosure by the German companies that do possess this information would violate German data protection laws and subject those companies to civil and criminal penalties. Notwithstanding this record, the Ninth Circuit has determined that the Commissioner may demand that the Gerling Petitioners do the impossible or face expulsion from the State.

In addition to its direct conflict with the Eleventh Circuit, the Ninth Circuit decision represents a dramatic departure from the well-established due process jurisprudence of this Court. It authorizes California to investigate and regulate insurance transactions which occurred far beyond its borders and which have no identifiable contacts with the state. It strips California

license holders of their right to a meaningful hearing prior to the state's deprivation of their property interests. It also violates the most basic concepts of fundamental fairness by penalizing the Gerling Petitioners for their inability to provide information beyond their control.

The Ninth Circuit decision presents issues of national and international importance. The resolution of Holocaust-era claims has been the subject of U.S. foreign policy since the end of the Second World War. This has resulted in a series of treaties and other agreements with numerous countries. It has also resulted in the enactment of domestic legislation by the Federal Republic of Germany leading to reparation payments of billions of dollars to Holocaust survivors and their heirs. As the United States has expressly stated, "the premise of the California legislation is in direct conflict with that of United States foreign policy." March 9, 2001 U.S. *en banc Amicus* Brf. at 1. ER 1255.[2]

Notwithstanding the foregoing, and in disregard to the repeated complaints of interference with foreign policy raised by the United States, Germany and Switzerland, the Ninth Circuit simply refused to follow this Court's precedent in *Zschernig v. Miller*, 389 U.S. 429 (1968), with respect to the Gerling Petitioners' facial and as-applied foreign affairs challenges to the HVIRA. Such blatant refusal to follow this Court's precedent clearly mandates review.[3]

1. The Statutory Scheme.

On October 8, 1999, California Governor Gray Davis signed into law Assembly Bill No. 600, the "Knox Bill." Lodg., *infra*, L-36-L-41. The Knox Bill represents California's attempt to use its leverage over local insurers to force European insurers,

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2. Citations to "ER" and "SER" refer to excerpts of record and supplemental excerpts of record in the court of appeals.

3. The Gerling Petitioners also join in and fully adopt the questions presented and arguments set forth in the Petition for a Writ of Certiorari in *American Ins. Ass'n v. Low* (No. 02-).

over whom California has no jurisdiction, to produce information concerning every insurance policy in effect in Europe between 1920 and 1945. *See* Cal. Ins. Code § 13801(e). California undertook this mission to achieve a clearly defined goal – to aid in "the rapid resolution" of Holocaust insurance claims arising out of policies issued in Europe. Lodg., *infra*, L-39.

To that end, the Knox Bill extended the statute of limitations for claims arising under such European policies until December 31, 2010, nullified forum selection provisions contained in European policies, vested California state courts with jurisdiction over related claims, and provided that California-licensed companies could be held directly liable for claims arising out of policies issued by a "related company." Lodg., *infra*, L-36-L-41. The Knox Bill also purported to modify the value of pre-1945 European policies by eliminating the effects of post-war currency devaluation. Lodg., *infra*, L-39.

The Knox Bill introduced an expansively-worded definition of the term "related company" to throw the broadest possible net over the European insurance industry: "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Lodg., *infra*, L-39; Cal. Ins. Code § 13802. This definition is not limited to companies within the same "corporate family," but extends to entities with little more than contractual or other legal relationships with the California company. *Id.*

The reporting portion of the Knox Bill is known as the Holocaust Victim Insurance Relief Act (the "HVIRA" or the "Act") and was codified at Cal. Ins. Code §§ 13800-13807. The remaining portions of the Knox Bill were codified at Cal. Code Civ. Pro. § 345.5. Lodg., *infra*, L-37-38. The HVIRA requires all California-licensed insurers to provide the Commissioner with information regarding every European insurance policy issued by it or a "related company" in effect

between 1920 and 1945.[4] Cal. Ins. Code § 13804(a). The information required includes: the number of policies; the holder, beneficiary and current status of those policies; and the city or origin, domicile or address for each policy holder listed in the policies. *Id.* The HVIRA further requires the California insurer to certify, under threat of criminal penalty, whether: the proceeds have been paid; the beneficiary has been located; the proceeds have not been distributed; or no relevant policies were sold. Cal. Ins. Code § 13804(b).

In the event that the California licensee fails to fully comply with the HVIRA, "[t]he commissioner shall suspend the certificate of authority to conduct insurance business in the state . . ." Cal. Ins. Code § 13806. This penalty is mandatory. Lack of control over the information sought and disclosure prohibitions embodied in European privacy laws are not acceptable defenses. ER 1019-20, 1030, 3179. Moreover, the HVIRA does not expressly provide for an administrative hearing prior to license suspension. Cal. Ins. Code §§ 13800-13807.

The Knox Bill (and resulting HVIRA) largely tracks the Florida Holocaust Victims Insurance Act enacted in 1998. Fla. Stat. Ann. § 626.9543. Lodg., *infra*, L-29-L-33. The most significant difference between the two pieces of legislation is the penalty for non-compliance: the Florida statute merely requires compliance to the "extent possible," Fla. Stat. Ann. § 626.9543(7); Lodg., *infra*, L-31. In contrast, the HVIRA mandates license suspension, irrespective of whether compliance by the California company is possible. Cal. Ins. Code § 13806.

2. U.S. Foreign Policy Initiatives.

The Knox Bill was passed in disregard to 55 years of U.S. foreign policy efforts aimed at securing compensation and reparations for victims of the Holocaust. To date, those efforts

4. The HVIRA only applies to insurers with existing California licenses. Cal. Ins. Code § 13804(a). It does not impose similar reporting obligations on new applicants for California licenses. On its face, therefore, the HVIRA is irrelevant to the licensing process.

have resulted in the payment by Germany (and by the German private sector) of over 100 billion *Deutschmark* to Holocaust victims and their heirs. ER 847.

A. Post-War Reparations

At the conclusion of the Second World War, the United States immediately took steps to provide restitution and compensation for the victims of Nazi oppression. SER 529-57, 562-64. As a result of negotiations in 1952 and 1954, treaties were adopted between the Federal Republic of Germany, the United States, the United Kingdom and France.[5] These treaties included the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on May 26, 1952, as amended by Schedule 4 to the Protocol on the Termination of the Occupation Regime, signed at Paris on October 23, 1954, 332 U.H.T.S. 219 (the "Transition Agreement"). SER 377-462. In the Transition Agreement:

> The Federal Republic [of Germany] acknowledges the obligation to assure in accordance with the provisions of paragraphs 2 and 3 of this Chapter adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution).

SER 400. *See also* K. Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U.L. Rev. 479-527 (1972).

In accordance with its treaty obligations with the United States and other nations, Germany enacted a comprehensive compensation law (the *Bundesentschädigungsgesetz* ("BEG")) in 1953 to provide for the reimbursement of assets which

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5. A comprehensive discussion of post-War reparations efforts is described in *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248 (D. N.J. 1999).

had been seized by the Nazis. This statute expressly provides compensation for loss of insurance assets. SER 1437-38. Under the BEG, the Federal Republic of Germany *assumed the obligation* to compensate victims of Nazi oppression as the sole and exclusive remedy for such claims. SER 1437-38.

As a corollary to the BEG's compensation provisions, German law *precludes direct claims against German insurers* for insurance proceeds that were subject to Nazi seizure. SER 466-94, 1438. Under the BEG, Germany obligated itself to compensate victims of Nazi oppression. SER 1436-1438. In a 1953 decision, the Supreme Court of the Federal Republic of Germany held that claims for insurance proceeds appropriated by the Nazi government could not be asserted against the insurers who issued the policies. Instead, such claims must be asserted directly against the Federal Republic of Germany, as legal successor to the Nazi government. SER 464-94.

B. The Executive Agreement

On July 17, 2000, the United States and Germany entered into an Executive Agreement creating the Foundation "Remembrance, Responsibility and the Future" (the "Executive Agreement"). SER 1447-53; ER 818-37. The Executive Agreement is intended to provide a mechanism for "German companies" (as defined in the Executive Agreement) "to respond to the moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all wrongs suffered during the National Socialist era and World War II." SER 1448. With respect to insurance claims, the goal of the Executive Agreement is to secure a measure of compensation to Holocaust victims at the earliest possible date in accordance with the claims procedures established by the International Commission on Holocaust-era Insurance Claims ("ICHEIC").[6] SER 1451.

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6. ICHEIC was established in October 1998 to investigate and resolve Holocaust-era insurance claims. The California Insurance Commissioner is a founding member of ICHEIC. ER 834.

In furtherance of the goals of the Executive Agreement, on August 12, 2000, the German *Bundestag* established the Foundation "Remembrance, Responsibility and the Future" (hereinafter, the "German Foundation") as a sovereign instrumentality of Germany to resolve these claims. ER 1382-84. The German government and German companies have funded the German Foundation in an amount totaling DM 10 billion. SER 1427-28.

In the Executive Agreement, the United States and Germany recognized that it would be in their respective *foreign policy interests* to achieve "all-embracing and enduring legal peace." SER 1449; *see also* ER 818-37. The concept of "all-embracing and enduring legal peace," which is the stated foreign policy interest of the United States, reflects the principle that "German business . . . should not be asked to contribute again [or twice] . . . for any wrongs asserted against German companies arising from the National Socialist era and World War II." ER 1449.

In accordance with its objectives, the Executive Agreement requires the United States government to "use its best efforts . . . with state and local governments" to achieve "all-embracing and enduring legal peace" for "German companies." SER 1451. The Gerling Petitioners and their German affiliates are all "German companies" as that term is defined in the Executive Agreement. *See* Lodg., *infra*, L-44. Therefore, the HVIRA, as applied to them, clearly interferes with the Executive Agreement and its objectives.

In a November 2001 report to the *Bundestag*, the German government noted that disclosure requirements contained in the HVIRA are in contravention to the Executive Agreement. The German government specifically stated that "it is intended that the American commissioners of insurance" shall recognize the Executive Agreement as the "permanent settlement of the insurance policy questions from the Nazi era," and that "additional actions [including administrative actions] against

German insurance companies shall thereby permanently cease." Lodg., *infra*, L-48.

On October 16, 2002, ICHEIC, the German Foundation and the German Insurance Association reached an agreement regarding claims handling procedures and the publication of pertinent insurance records (in a manner satisfying the requirements of European data protection laws). Lodg., *infra*, L70-L89.

3. The Gerling Petitioners.

The Gerling Petitioners are six insurers and/or reinsurers licensed to do business in Florida, California and numerous other states. Not one of the Gerling Petitioners ever issued an insurance policy that was in force in Europe before or during World War II; in fact, five of the six Gerling Petitioners did not even exist at the time of World War II. ER 616.

The Gerling Petitioners are, however, "related companies" with two German insurers that issued policies in Europe during the period in question: Gerling-Konzern Allgemeine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL"). App., *infra*, 47a. Neither of these German insurers is jurisdictionally present in California. *Id.* Of these two, only GKL (a German life insurer) reportedly has any records surviving from the pre-1945 period. SER 1055-62. Neither of these German insurers is a direct parent or subsidiary of any of the Gerling Petitioners. *Gallagher*, 267 F.3d at 1231; Lodg., *infra*, L-6.

The district court expressly found that none of the Gerling Petitioners "is in possession, custody or control of records pertaining to any insurance policies in force in Europe at any time between 1920 and 1945." App., *infra*, 47a. Moreover, the Gerling Petitioners do not have control over their two German affiliates that issued such policies. While the Gerling Petitioners have requested that those German affiliates provide the

information required by the HVIRA, those companies have declined to do so, citing privacy concerns arising under German law. ER 644, 649, 654, 659, 664, 669. In fact, relevant German governmental authorities have concluded that compliance with the HVIRA's disclosure rules would violate civil and criminal provision of German law. ER 1182, 3131-32.

4. German Data Protection Laws.

The control and dissemination of personal information (including insurance information) in Europe is subject to limitations set forth in the data protection laws of the various European nations. ER 1488-1542. Personal data maintained by German insurers may only be disclosed to third parties in accordance with the requirements of the German Data Protection Act (*Bundesdatenschutzgesetz* ("BDSG")). ER 682, 846.

The BDSG arises out of protections contained in the Constitution (*Grundgesetz*) of the Federal Republic of Germany. *Entscheidungen des Bundesverfassungsgerichts*, Vol. 84 (1992) 197; 85 (1992) 219, at p. 224; 100 (1999) 313, at p. 359 *et. seq.* Under the BDSG, decisions as to the use of personal data must be made by the individuals to whom the data relates. ER 681. The entity holding the personal data (in this case, German insurers) may be subject to civil and criminal penalties as a result of their unauthorized disclosure of such data to third parties. SER 1248.

The privacy protections of the BDSG are simply incompatible with the HVIRA. While the BDSG empowers each individual to determine how his or her personal information is used, the HVIRA requires the wholesale disclosure of all insurance information relating to all insurance policies in force in Europe over a twenty five year span. *Id.*; Cal. Ins. Code § 13804(a). The HVIRA further requires that this information be included in a publicly accessible registry. Cal. Ins. Code § 13803.

The German governmental authorities charged with enforcement of the BDSG have already concluded that compliance with the HVIRA would violate German law and would subject German insurers to criminal and civil penalties. On May 16, 2000, the District Government of Cologne, Germany, concluded "that pursuant to § 28 paragraph 2, No. 1b BDSG, the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . is not permissible." ER 1182.

Following certain amendments to the BDSG, the Ministry of the Interior of North Rhine-Westphalia (Nordhein-Westfalen) also determined that "there still appears to be no legal basis that permits the transfer of all personal insurance data for the policies from the period 1920-1945. The substantive requirements of Section 28 BDSG for the transfer of data . . . continues to be limited to [Holocaust victims.]" ER 3131. In a series of *amicus curiae* briefs filed with the Ninth Circuit in this litigation, the Federal Republic of Germany echoed that conclusion.[7] ER 846; SER 1248; March 15, 2002 *Amicus brf.* of FRG at p. 6; August 5, 2002 *Amicus brf.* of FRG at 9-10.

Privacy laws, such as the BDSG are commonplace in the United States as well. In fact, California has similar privacy requirements concerning insurance policies issued there. *See* Cal. Ins. Code § 791.13; *see also* 15 U.S.C. § 6802(a). Nevertheless, California demands German companies to violate their nation's own laws on this issue.

5. The Decisions Below.

The Gerling Petitioners initiated this litigation against the Commissioner on March 9, 2000, in the U.S. District Court for

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7. These concerns were also expressly recognized and addressed in the recent agreement between ICHEIC, the German Foundation and the German Insurance Association: "[t]he confidentiality of the list of German companies' holocaust era insurance policies will be protected respecting all data protection regulations." Lodg., *infra*, L-161.

the Eastern District of California. ER 1-15. The action was brought pursuant to 42 U.S.C. § 1983 and sought declaratory and injunctive relief based on the alleged unconstitutionality of the HVIRA and certain related California statutes.[8] *Id.* The complaint specifically alleged that these statutes violated various provisions of the U.S. Constitution both facially and as-applied to the Gerling Petitioners. *Id.*

On their motion for preliminary injunction, the district court held that the Gerling Petitioners demonstrated a probability of success on the merits of their claims that the HVIRA facially violated the foreign affairs doctrine and the Commerce Clause. App., *infra*, 138a-139a. The district court entered a preliminary injunction preventing the Act's enforcement. *Id.* at 139a. The Ninth Circuit subsequently reversed the district court's reasoning, holding that the HVIRA was exempt from a Commerce Clause challenge because, on its face, the HVIRA only regulated California insurers and that Congress delegated to the states the power to regulate insurance under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014. App., *infra*, 84a-85a. In dismissing the facial foreign affairs challenge, the Ninth Circuit further held that *Zschernig*, *supra*, does not govern, that the statute mainly involves foreign commerce and is not directed at a particular country. *Id.* at 100a-101a. The Ninth Circuit did, however, maintain the preliminary injunction to give the district court an opportunity to consider the Gerling Petitioners' due process challenge. *Id.* at 103a.

On remand, the district court granted the Gerling Petitioners' summary judgment motion, holding that the HVIRA violated the Due Process Clause because it mandated the performance of impossible tasks and required automatic license suspension

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8. In June 2000, the district court dismissed, without prejudice, the Gerling Petitioners' claims regarding the constitutionality of the California statutes other than the HVIRA. The district court reasoned that the Gerling Petitioners did not, at the time, have the requisite standing to challenge those related statutes. *See* App., *infra*, 76a-77a.

without providing for a meaningful opportunity to be heard. App., *infra*, 69a. The Ninth Circuit, which declined to adopt the Eleventh Circuit's holding in *Gallagher*, reversed holding that the HVIRA did not regulate extraterritorially. App., *infra*, 10a-13a, 24a. The Ninth Circuit further held that the HVIRA did not, on its face, violate the Due Process Clause because a defense based on lack of control over records would thwart the HVIRA's purposes and that other provisions of California law create a presumption that HVIRA requires the Commissioner to hold a hearing.[9] *Id.*, at 32a, 34a.

REASONS FOR GRANTING THE PETITION

The court of appeals' holdings merit this Court's review because:

First, the Ninth Circuit's holdings create a direct conflict among the circuits that can be effectively resolved by this Court alone. The Eleventh Circuit has previously held that when a statute seeks "the production of information by these Plaintiffs [the Gerling Petitioners] regarding Holocaust-era policies issued outside Florida by German entities having only some corporate affiliation with them and no other contacts to Florida, it violates due process limits on legislative jurisdiction." *Gallagher*, 267 F.3d at 1240; Lodg., *infra*, L-27. Conversely, the Ninth Circuit found constitutional a California statute which calls for the production of the same information from the same entities on an identical factual record. *See* App., *infra*, 10a.

Second, in declining to follow this Court's holding in *Zschernig* with respect to the Gerling Petitioners' facial and

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9. The Ninth Circuit's decision rendered moot a related appeal which the Gerling Petitioners had taken from an order of the district court denying their motion for attorneys' fees pursuant to 42 U.S.C. § 1988. Given the Ninth Circuit's decision, the Gerling Petitioners were no longer deemed "prevailing parties" for purposes of recovering such fees. The Gerling Petitioners reserve their rights to reassert such a claim in the event that this Court ultimately reverses the Ninth Circuit.

as-applied challenges under the foreign affairs doctrine, the Ninth Circuit has permitted California to infringe upon the federal government's exclusive authority over foreign affairs.

I. THE DECISION BELOW CONFLICTS WITH WELL-ESTABLISHED DUE PROCESS PRECEDENT OF THIS COURT AND OF OTHER CIRCUIT COURTS.

The Ninth Circuit decision conflicts with the due process jurisprudence of this Court with respect to an issue of national and international significance. In addition to California and Florida, four states have enacted similar Holocaust-era insurance legislation, while four others have similar legislation pending.[10] Review should be granted to prevent a nationwide irreparable harm that will impact not only the Gerling Petitioners, but significant portions of the insurance industry and the nation's insurance consumers as well.

A. The Decision Is In Direct Conflict With The Eleventh Circuit's Decision In *Gallagher*.

California and Florida have enacted materially identical Holocaust-era insurance reporting statutes. Cal. Ins. Code §§ 13800-13807; Fla Stat. Ann § 626.9543, Lodg., *infra*, L-29-L-33. In practice, the statutes require the Gerling Petitioners to obtain and produce the same records from the same German insurers regarding the same German policies. The sole expressed subject matter of both statutes is the payment of claims arising under Holocaust-era policies. Cal. Ins. Code § 13807; *Gallagher*, 267 F.3d at 1238, Lodg., *infra*, L-25, L-30. Those policies were issued in Europe by German entities having only some tangential

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10. *See* Md. Code Ann., Ins. § 28-105 (2000); Minn. Stat. § 60A.053; N.Y. Ins. Law § 2705 (McKinney 1998); and Wash. Rev. Code § 48.104.060 (2002). *See also* HB 3346, 92nd Gen. Assem., Reg. Sess. (Ill. 2001); S.B. 741, Mass 182nd Gen. Court 2001 Reg. Sess. (Mass. 2001); N.J.S.B. 2128, 2000 Leg., 209th Sess., 2nd. Reg. Sess. (N.J. 2000); and H.B. 6009, 2001-2001 Leg. Sess. (R.I. 2001).

corporate affiliation to the Gerling Petitioners and no other contacts with Florida or California. The Gerling Petitioners do not have care, custody or control over any of the information required by either statute. App., *infra*, 47a; Lodge., *infra*, L-7 .

Faced with those facts, the Eleventh Circuit held that the Florida statute violated the Due Process Clause:

> . . . to the extent the Act calls for the production of information by these Plaintiffs regarding Holocaust-era policies issued outside Florida by German entities having only some corporate affiliation with them and no other contacts to Florida, it violates Due Process limits on legislative jurisdiction.

Gallagher, 267 F.3d at 1240, Lodg., *infra*, L-27. Characterizing the Gerling Petitioners as the "nominally" regulated parties, the Eleventh Circuit found that Florida's:

> reporting provisions pertain to, and as a practical matter unquestionably seek to regulate, a subject matter – the German affiliates' payment or non-payment of Holocaust-era policy claims – with no jurisdictionally-significant relationship to Florida.

Id. at 1238, L-22.

Despite an indistinguishable record, the Ninth Circuit rejected the analysis of the Eleventh Circuit and found that the HVIRA's requirement that the same six companies produce information regarding the same German insurance policies issued outside California by German entities having no direct contacts to California does not violate the Due Process Clause. App., *infra*, 10a-13a, 24a. Given the fact that the Ninth and Eleventh Circuits had before them identical issues, identical parties and an identical factual record, the conflict created by the Ninth Circuit decision can not be more clear.

1. The Ninth Circuit's Purported Distinctions.

Before announcing its disagreement with the Eleventh Circuit, the Ninth Circuit made three attempts to distinguish *Gallagher*. Each of these attempts was contradicted by the record.

First, the Ninth Circuit stated that, in Florida, "information was demanded directly from both local and foreign entities, while here information is sought *only* from the California licensees." App., *infra*, 11a. (Emphasis in original). The Ninth Circuit was mistaken. In fact, only California made direct demands on foreign entities.

In *Gallagher*, the Florida Commissioner issued subpoenas to the Gerling Petitioners seeking information exclusively in the possession of their German affiliates. These subpoenas were served only on the Gerling Petitioners and were enforceable only against the Gerling Petitioners. *Gallagher*, 267 F.3d at 1236, Lodg., *infra*, L-7.

In contrast, California repeatedly demanded information directly from the German affiliates of the Gerling Petitioners. ER 1114-15; SER 1072-89. In March 2000, California Treasurer Philip Angelides issued a written demand to GKL in Germany, that it comply with the HVIRA to "eliminate the need for litigation." He warned GKL that "[t]he absence of compliance exposes [your company] and others to protracted litigation." SER 901-08.

Likewise, at a "pre-enforcement" hearing conducted by the Department of Insurance in 1999, the Department's senior counsel conceded that the HVIRA "clearly goes beyond the California licensed company." ER 1111. The Commissioner made it clear that an officer of Petitioner Gerling America Insurance Company was inadequate to speak to the compliance issue because he did not know what records were maintained by the German entities. *See supra.*

Shortly prior to the enactment of the HVIRA, the Commissioner served on GKA and GKL written interrogatories and conducted a telephone deposition of one of their German corporate officers. SER 1072-89. In short, the direct enforcement efforts undertaken by California with respect to foreign companies far exceeded those undertaken by Florida.

Second, the Ninth Circuit claimed that "the sole purpose of the Florida statute was the payment of Holocaust-era claims and that no other justification for the statute, such as the Florida licensees' fitness to do business, had been properly advanced." App., *infra*, 11a. With respect to the HVIRA, the Ninth Circuit simply ignored its stated legislative purpose of the HVIRA and "construed" it as having other legitimate purposes. *Id.* at 19a.

In fact, the Florida Commissioner did argue that the purpose of the Florida statute was, in part, to "confirm the claims payment practices, solvency, and 'good character' of the Florida insurer." *Gallagher*, 267 F.3d at 1239, Lodg., *infra*, L-24. The Eleventh Circuit found that this explanation was undercut by the Florida legislature's "unequivocal statement of its purpose" – that is, to secure the payment of Holocaust-era claims. *Id.*, Lodg., *infra*, L-25.

In its final attempt to distinguish *Gallagher*, the Ninth Circuit noted that the "only statute at issue in this appeal is a reporting statute." App., *infra*, 12a. That was also true in *Gallagher*. *See* 267 F.3d at 1234, Lodg., *infra*, L-14. ("The only issue before us, and the *only* issue we resolve today, is extremely narrow, and concerns solely the validity of the Act's reporting provisions.")

In sum, there was simply no basis to distinguish the statutory scheme struck down in *Gallagher* from the scheme upheld by the Ninth Circuit here.

2. The Decision Directly Conflicts With This Court's Legislative Due Process Jurisprudence.

The Due Process Clause places limits on the territorial reach of a state's legislative jurisdiction. "[I]f a state has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality opinion); *see Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). "Legislative Jurisdiction refers to both the 'lawmaking power of a state' and 'the power of a state to apply its laws **to any given set of facts** . . .'" *Gallagher*, 267 F.3d at 1236, Lodg., *infra*, L-17 (emphasis supplied) (quoting *Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 435-35 (4th Cir. 1999) (internal citations omitted)).

In *Gallagher*, the Eleventh Circuit faithfully applied this standard:

> The subject of the Florida Legislature's concern in the Holocaust Victims Insurance Act is Holocaust-era insurance policies and the payment of claims still due under those policies. While there may be a connection between the State of Florida and that subject to the extent it relates directly to the activities of Florida insurers, there is virtually *no* connection between the State of Florida and that subject to the extent it concerns insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany.

267 F.3d at 1238, Lodg., *infra*, L-21. Exactly the same analysis applies here. There is simply no connection between California and insurance transactions that took place years ago in Germany, among German residents, under German law, relating to persons, property and events in Germany. *See id.* California simply cannot

regulate these transactions consistent with the Due Process Clause.

To avoid this flaw, the Ninth Circuit attempted to recast the general limitation on legislative jurisdiction into three specific tests. In the court's new formulation, a challenge on legislative jurisdiction grounds can succeed only if the statute in question (1) regulates out-of-state entities based on incidental in-state conduct, (2) regulates the substance of out-of-state transactions, or (3) taxes in-state entities arising from transactions conducted entirely out of state. App., *infra*, 13a-22a. Nothing in this Court's precedent suggests that these categories are exclusive. In any event, the HVIRA plainly fits within at least two of these three categories.

First, the HVIRA clearly attempts to regulate out-of-state entities on the basis of incidental contacts with the state. The Gerling Petitioners did not write any insurance policies in effect in Europe between 1920 and 1945, and they do not have possession, custody or control over any such policies. App., *infra*, 47a. While the HVIRA nominally requires the Gerling Petitioners to produce information about such policies, the real effect of the HVIRA is to require their German affiliates to produce such information.

Rather than acknowledging that, as a practical matter, the HVIRA requires foreign companies to produce information to the California licensees, the Ninth Circuit claimed that the California licensees could take on the burden by having their employees "travel overseas to examine the documents themselves." App., *infra*, 15a. This "solution" disregards the fact that the Gerling Petitioners and their German affiliates are separate corporate entities. The Ninth Circuit also disregarded the fact that the German government has concluded that the German affiliates can not provide access to this information without subjecting themselves to criminal sanctions. ER 1248, 1182, 3131-32.

The Ninth Circuit further suggested that the California licensees could spare their German affiliates the burden of compliance by "disaffiliating" from them. App., *infra*, 15a. But this "solution" simply represents another form of extraterritorial regulation. The Ninth Circuit has offered the foreign companies a choice: either turn over to your California-licensed affiliates all information regarding these policies, or disaffiliate from those California-licensed companies.

Second, the HVIRA is undeniably part of a legislative scheme designed to regulate the substance of out-of-state transactions. The Ninth Circuit found that the HVIRA merely requires the reporting of information about foreign insurance policies and, accordingly, is not a form of regulation. App., *infra*, 10a. To reach that conclusion, the court had to close its eyes to the fact that the HVIRA was adopted as part of the same legislation (the Knox Bill) which purported to give California courts jurisdiction over claims under Holocaust-era insurance policies, and which extended the long-expired statute of limitations for such claims (Cal. Code Civ. P. § 345.5). Lodg., *infra*, L-36-L-41.

The Due Process Clause prohibits a state from adopting such extraterritorial legislation. This is the teaching of *Home Ins. Co. v. Dick*, 281 U.S. at 407-08, and the Ninth Circuit should have followed it here.

B. The Decision Conflicts With This Court's Precedent Establishing The Requirement Of A "Meaningful Hearing" Prior To License Suspension.

It is well-established precedent of this Court that a party that stands to lose a protected interest (such as a license) is entitled to certain due process safeguards. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *see also United States v. Dalton*, 960 F.2d 121 (9th Cir. 1992)

(holding it violative of fundamental fairness to convict defendant for failing to do an act that he was incapable of performing).

Once it is determined that the interest at stake is a protected property interest, the sole question that remains is what process is due. *Logan*, 455 U.S. at 428; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985). The Gerling Petitioners' California licenses are clearly protected by the Due Process Clause. *See Bell*, 402 U.S. at 539. They must, therefore, be afforded a "meaningful" hearing before their licenses are suspended.

The fundamental requirement of a "meaningful hearing" is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews*, 424 U.S. at 333. The ability to present reasons why a proposed action should or should not be taken is to influence the decision maker. "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ.*, 470 U.S. at 546.

The Gerling Petitioners do not have custody or control of the information sought. App., *infra*, 47a. They do not have the ability to force other companies to violate their own domestic laws to provide this information. *Id.* In order for an HVIRA compliance hearing to be "meaningful," the Gerling Petitioners must be given the opportunity to present these basic defenses.

The outcome of any hearing which may be afforded under the HVIRA is predetermined. The HVIRA provides for automatic license suspension without due process of law. *See* Cal. Ins. Code § 13806. The record is clear that an administrative law judge conducting a hearing regarding HVIRA compliance would not be permitted to exercise any discretion as to whether non-compliance might be excused or justified or mitigated in any way that could affect the outcome of the hearing. ER 1019-20, 1030, 3179. A hearing cannot possibly be "meaningful" if the Gerling Petitioners' only option is to proceed

with a hearing, remain mute, and await the predetermined conclusion to be rendered.[11]

The Ninth Circuit held that since other provisions of California law entitled the Gerling Petitioners to a hearing, the requirements of the Due Process Clause were satisfied. App., *infra*, 34a. In effect, the court dispensed with the requirement that a hearing must be "meaningful" in order to satisfy due process. This conclusion, if left alone, would "allow the State to destroy at will virtually any state-created property interest" (*Logan*, 455 U.S. at 432) and directly conflicts with numerous decisions of this Court and countless circuit courts as well.

C. The Ninth Circuit Erred In Failing To Recognize That It Is Fundamentally Unfair To Punish A Party For Something Wholly Outside Its Control.

This Court has repeatedly recognized that it is fundamentally unfair to punish a party for something that is wholly outside of its control and to which it has no relation. *Societe Internationale v. Rogers*, 357 U.S. 197 (1958); *Maggio v. Zeitz*, 333 U.S. 56, 74 & n.6 (1948). The Ninth Circuit's decision represents a serious departure, not only from this Court's precedent, but from innumerable circuit court decisions as well. *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 781 & n.8 (9th Cir. 1983) (and cases cited therein); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980); *Cine Forty-Second St. Theater Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979).

In *Rogers*, 357 U.S. 197 (1958), this Court held that litigants may not be penalized for refusing to violate foreign law.

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11. *See Lee v. State of Rhode Island*, 942 F. Supp. 750, 755 (D.R.I. 1996); *Hayes v. Reed*, 1997 U.S. Dist. LEXIS 2992 (E.D. Pa. Mar. 13, 1997) (where outcome of hearing is predetermined, such hearing is a "sham").

This Court held that even though the plaintiff had control of the documents sought, it should not be penalized for its failure to produce them. Here, the Gerling Petitioners' circumstances are more compelling. Unlike the plaintiffs in *Rogers*, they do not have control of the documents sought under the HVIRA. App., *infra*, 47a. Furthermore, the relevant German authorities have already determined that production of the information sought under the HVIRA would violate German law. ER 1182, 3131-32.

Moreover, where the information could be found from alternative means, there is "little or no reason to require a party to violate foreign law." *Richmark v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir. 1999) (citing *In re Sealed Case*, 825 F.2d 494 (D.C. Cir.), *cert. denied*, 484 U.S. 963 (1987)). The German Foundation has recently reached an agreement with ICHEIC addressing, in part, the publication of relevant insurance information. Lodg., *infra*, L-70-L-89. This agreement adopts a procedure which addresses the legitimate data protection concerns of Germany. *Id.* at L-147-L-162. There is simply no reason to interfere with German law when, in fact, relevant information will be made available.

II. THE DECISION BELOW CONFLICTS WITH THE FOREIGN AFFAIRS PRECEDENT OF THIS COURT AND OF OTHER CIRCUITS.

On its face, the HVIRA requires production of information regarding insurance policies sold "to persons in Europe, which were in effect between 1920 and 1945." Cal. Ins. Code § 13804(a). As applied to the Gerling Petitioners, this requirement is limited to policies issued by German insurers to German residents under German law. In its application, the HVIRA interferes with German domestic law on such issues as data protection, currency valuation, insurance regulation and Holocaust reparations and compensation. It was enacted in disregard of protests lodged by the U.S. federal government and it interferes with 55 years of U.S. foreign policy efforts.

A. The Decision Conflicts With This Court's Decision In *Zschernig*.

The Ninth Circuit's ruling departs from this Court's decision in *Zschernig*, *supra*. In *Zschernig*, the Court struck down an Oregon probate law that allowed a foreign citizen to inherit from a decedent's estate only if United States citizens could inherit from a decedent's estate in the foreign citizen's country. 389 U.S. at 431. The Court noted that the statute at issue required state courts to engage in "minute inquiries concerning the actual administration of foreign law" and to judge the credibility and good faith of foreign diplomatic statements. *Id.* at 435.

The Court held that the Oregon statute constituted an impermissible intrusion by the state into the field of foreign affairs, stating that "[t]he statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. The Court further held that a state statute is unconstitutional if it has "more than 'some incidental or indirect effect in foreign countries'" or "great potential for disruption or embarrassment" of American foreign policy. *Id.* at 434-35.

The HVIRA has more than some "incidental or indirect effect in foreign countries" and certainly creates "great potential for disruption or embarrassment" to U.S. foreign policy. In describing the effects of the HVIRA, the United States has stated that the HVIRA's disclosure requirements constitute "not merely a theoretical, but actual interference with the United States' conduct of foreign policy, that undermines the Constitution's exclusive grant to the national government of authority to conduct foreign policy." August 5, 2002 Rehearing *en banc* Amicus brf. of U.S. at 15.

1. The HVIRA Has Direct Effects In Foreign Nations.

The Ninth Circuit erred in failing to acknowledge that the HVIRA has direct effects in foreign countries, particularly in Germany. In fact, aside from the penalty associated with

noncompliance, the HVIRA's effects are exclusively targeted abroad – it only demands information regarding insurance policies sold in Europe. Cal. Ins. Code § 13804(a).

As applied to the Gerling Petitioners, the HVIRA requires companies domiciled in Germany (with no jurisdictional presence in California) (*see* App., *infra*, 47a) to gather and disclose information in direct violation of German data protection laws. ER 1182, 3131-32. The German insurers' refusal to violate their own domestic laws will result in the mandatory suspension of the Gerling Petitioners' California licenses. *See* Cal. Ins. Code § 13806. As such, the HVIRA seeks to trump the law of the Federal Republic of Germany.

The HVIRA further interferes with German domestic law by redefining the value of German insurance policies by eliminating "diminution for wartime or immediate postwar currency devaluation." Cal. Ins. Code § 13802(c). Through this new definition, California is attempting to "legislate away" the historical fact of post-War currency devaluation in Germany.[12]

The HVIRA calls into question 50 years of domestic German reparations and compensation efforts. The gathering and publication of information under the HVIRA is intended to "facilitate the resolution" of European insurance claims pursuant to California-imposed standards, in contravention to German reparations laws. Cal. Ins. Code § 13801. Not surprisingly, the Federal Republic of Germany has characterized the HVIRA as an "affront to [its] sovereignty." July 27, 2001 FRG A*micus* brf. in support of Petition of Writ of Certiorari.

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12. At the conclusion of Word War II, the German currency (the *Reichsmark*) was essentially rendered worthless. In 1948, it was replaced by the *Deutschmark* at a conversion rate of 10 to 1. All German financial obligations (including the value of insurance policies) were adjusted accordingly. SER 1249.

2. The HVIRA Poses Great Potential For Disruption Or Embarrassment to U.S. Foreign Policy.

Holocaust reparations has been an important concern of U.S. foreign policy since the conclusion of the Second World War. Most recently, U.S. foreign policy efforts have resulted in the Executive Agreement. SER 1447-53; ER 818-37. The goal of the Executive Agreement is to provide a remedy for Holocaust-era claims so that "German companies" can have a measure of "all embracing and enduring legal peace." ER 1449.

The Gerling Petitioners fall within the definition of "German companies" under the Executive Agreement and have participated in the funding of the Foundation. *See* Lodg., *infra*, L-44. The HVIRA, however, does not permit them to enjoy the "legal peace" contemplated by the Agreement.

The HVIRA's demand for "information from European companies on activities that took place in Europe more than 50 years ago, under the threat of sanctions, have been described as *contrary to longstanding U.S. policy* that matters of Holocaust-era restitution and compensation should be resolved through negotiation, cooperation and dialogue." Lodg., *infra*, L-65-L-69, Ambassador Randolph M. Bell, Special Envoy for Holocaust issues, at a Congressional hearing held on September 24, 2002.

The HVIRA clearly creates "great potential for disruption or embarrassment" to U.S. foreign policy. *Zschernig*, 389 U.S. at 435. It has resulted in protests from some of this nation's closest allies. ER 1211-31, 1311-23. Under this Court's precedent in *Zschernig*, the HVIRA simply cannot stand.

B. The Decision Also Conflicts With The First Circuit's Decision In *Natsios*.

The Ninth Circuit's decision also conflicts with the First Circuit's decision in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd other grounds*, 530 U.S. 363

(2000). In *Nátsios*, the First Circuit held that a Massachusetts statute which banned state businesses from trading with companies that conduct business in Burma was unconstitutional under *Zschernig*.

The First Circuit held that the Massachusetts law had more than an indirect or incidental effect on foreign relations and found the following factors relevant: (1) the design and intent of the law was to affect the affairs of a foreign country; (2) Massachusetts, with its staggering annual purchasing power, was in a position to design and effectuate that design and intent; (3) the effects of the law could be magnified should Massachusetts prove to be a "bellwether" for other states; (4) the law resulted in serious protests from other countries; and (5) Massachusetts had chosen a course divergent from the federal law, thus raising the prospect of embarrassment for the U.S. *Natsios*, 181 F.3d at 53.

Application of these factors should have led to the same result here. *First*, the design and intent of the HVIRA is to affect affairs in a foreign country. To this end, the HVIRA is intended to facilitate the resolution of Holocaust-era claims and to force European insurers to pay claims. Further, it forces companies in Europe to take affirmative acts in direct contravention of their own domestic laws. *Second*, California, as the largest insurance market in the United States, is clearly in a position to effectuate the design and legislatively declared intent of the HVIRA. ER 223, 908, 1063. *Third*, the effects of the HVIRA will be magnified should California prove to be a "bellwether for other states." In fact, at least ten states are considering passage or have already passed similar statutes. *See* n.10, *supra*.

Fourth, the HVIRA has resulted in repeated protests from the Federal Republic of Germany, Switzerland and the United States. The German government has specifically stated that the HVIRA has an "adverse impact" on Germany's sovereign interests and its "foreign relations with the United States. . . ." August 9, 2002, FRG Rehearing *en banc Amicus* Brf. at 1.

Finally, the "course" chosen by California diverges from the Executive Agreement and the assurances made therein, "thus raising the prospect for embarrassment." The Ninth Circuit's decision squarely conflicts with the First Circuit's decision in *Natsios*, and therefore, review by this Court is warranted.

C. The HVIRA Interferes With Other U.S. Foreign Policy Initiatives.

The HVIRA also interferes with other U.S. international obligations in its potential impact on the implementation of the *General Agreement on Trade in Services* ("GATS"), Apr. 15, 1994, 33 I.L.M. 1125, to which both the U.S. and Germany are signatories. *See* 19 U.S.C. § 3511 (West 2002); 33 I.L.M 1125, 1131. In the GATS, Congress and the Executive Branch "recognize the contribution that liberal trading policies can make to the healthy growth and development of [the U.S. economy] and of the world economy as a whole." *Declaration on the Contribution of the World Trade Organization to Achieve Great Coherence in Global Economic Policymaking*, 33 I.L.M. at 1249. GATS "is the first multilateral, legally enforceable agreement covering trade and investment in the services sector," and serves as a mechanism to, in part, remove trade barriers and create open access to the world's insurance markets. *U.S.T.R. Statement of Administrative Action*, 1994 WL 761795; *Annex on Financial Services*, 33 I.L.M. at 1190.

GATS attempts to tear down trade barriers by granting "Most Favoured-Nation" ("MFN") treatment to its members. That is, each member grants to the other members' businesses "treatment no less favorable than that it accords to like services and service suppliers of any other country." *GATS*, part I, art. I(3)(a), 33 I.L.M. 1125, 1169. In its application, however, the HVIRA potentially interferes with U.S. fulfillment of its obligations under GATS by effectively closing California to German and other European insurers.

The U.S. has committed, under the GATS Fifth Protocol, to permit open access to the U.S. insurance markets subject to specific limitations. *See* World Trade Organization -Status of the Fifth Protocol, available at *http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_status_5prot_e.htm.* The U.S. expressly preserved various state laws as exceptions to the GATS. The HVIRA was not among the state laws preserved. *See* World Trade Organization-Financial Services Commitments and MFN Exemptions, available at *http://www.wto.org/english/ tratop_e/serv_e /finance_e/finance_commitments_e.htm.*

The United States has previously threatened to enforce the rights conferred by GATS against Japan to ensure U.S. insurance providers full access to the Japanese insurance market. U.S.T.R Press Release 99-12, available at *http://www.ustr.gov/releases/1999/02/99-12.pdf.* Those threats now ring hollow as the HVIRA effectively closes the world's seventh largest insurance market to European insurers. ER 223, 908. The HVIRA creates "great potential for disruption or embarrassment" of U.S. foreign policy in this important area. *Zschernig*, 389 U.S. at 435. Review by this Court is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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